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No. 94-464

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

THE NORTH CAROLINA RAILROAD COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of North Carolina

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REPLY TO BRIEFS IN OPPOSITION

L. P. MCLENDON, JR.
MACK SPERLING *
JAMES SAINTSING
BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, L.L.P.
Suite 2000 Renaissance Plaza
230 North Elm Street
P.O. Box 26000
Greensboro, NC 27420
(901) 373-8850

CARTER G. PHILLIPS
VINCENT F. PRADA
DONALD H. SMITH
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Attorneys for Petitioner

* *Counsel of Record*

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REPLY TO BRIEFS IN OPPOSITION

The question squarely presented in this case is whether the Interstate Commerce Act ("ICA") preempts a state court action to determine "whether the rail line of an interstate rail carrier must connect with the line of another railroad," when the Interstate Commerce Commission ("ICC") has authorized abandonment of the connecting tracks at issue. Pet. I. In this case, contrary to the principles established in *Chicago & North Western Transportation Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), and a long line of consistent holdings by this Court,[1] the North Carolina courts have asserted jurisdiction to impose on Norfolk Southern, under various state-law implied contract and property theories, liability for Norfolk Southern's decision to carry out a rail line abandonment that the ICC has expressly authorized. Review of the judgment below is necessary to preserve the vitality—and clarity—of the *Kalo Brick* rule, and to prevent states (and state courts) from regulating whether and when interstate railroads may lawfully abandon rail trackage.

Both Respondent North Carolina Railroad Company ("NCRR") and *amicus curiae* United States oppose review of the state court's judgment in this case, albeit on different (and inconsistent) grounds. NCRR argues that its state-law claims do not conflict with the ICC's abandonment order because it seeks only declaratory relief (and, possibly, damages) rather than an injunction, and

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[1] *See, e.g., Alabama Pub. Serv. Comm'n* v. *Southern Ry.*, 341 U.S. 341 (1951); *Palmer* v. *Massachusetts*, 308 U.S. 79 (1939); *Colorado* v. *United States*, 271 U.S. 153 (1926); *see also Transit Comm'n* v. *United States*, 289 U.S. 121 (1933) (ICA preempts state-imposed requirement that railroad grant another carrier access to its tracks and terminal facilities); *Alabama & Vicksburg Ry.* v. *Jackson & E. Ry.*, 271 U.S. 244 (1926) (ICA preempts state-imposed requirement that railroad establish and maintain physical connection and junction with another carrier); *Illinois Cent. R.R.* v. *DeFuentes*, 236 U.S. 157 (1915) (striking down state-imposed requirement that railroad switch cars for another carrier at a point of interchange between carriers).

because its claims arise out of contract and property obligations voluntarily assumed by Norfolk Southern. These assertions fundamentally mischaracterize NCRR's *own* complaint. The government, not surprisingly, does not join NCRR's theory nor, for that matter, does it even defend the rationale of the state courts. Rather, the government finds no conflict between NCRR's claims and the ICC's abandonment order by misconstruing the latter as authorizing *only* the cessation of railroad service by Norfolk Southern over the affected rail line. But, under the ICC's own regulations and uniform decisions of this and other courts, an ICC order authorizing abandonment of a rail line is an express determination that the abandoning railroad is permitted not only to cease service over the affected line but also to terminate the right-of-way and convert the underlying property to *non*-rail uses. Unquestionably, NCRR's claims would impose liability on Norfolk Southern for doing precisely that, and would do so *solely* because of the line's prior status as an operating rail line. The conflict with *Kalo Brick* is direct, substantial and irreconcilable.

A. Reply to NCRR

1. NCRR argues that its claims do not conflict with the ICC's abandonment order because NCRR seeks only declaratory relief (and thereafter, economic damages), and has "never demanded reconstruction or reconnection of the rail line abandoned" by Norfolk Southern. Opp. 8-10. This assertion is inaccurate. NCRR's complaint sought a declaration of its right, title and interest in the properties at issue, including Norfolk Southern's rail line. Pet. App. 31a. In addition, however, NCRR also expressly requested entry of a state court "order" forbidding Norfolk Southern from interfering with NCRR's alleged rights, including the use of an alleged easement and railroad right-of-way over Norfolk Southern's property and a "continuous through track connection" between NCRR's rail line and Norfolk Southern's rail line in downtown Charlotte. *Id.* at 28a-31a. The requested order is no different from a permanent injunction requiring Norfolk

Southern to provide and maintain the requested right-of-way and track connection over the very line segment that was the subject of the ICC-approved abandonment.[2]

In any event, NCRR's purported distinction between injunctive relief and damages is wholly illusory. The threat of state-imposed damages can and does frustrate federal authority as severely as state court-ordered injunctive relief. See *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959) ("regulation can be as effectively exerted through an award of damages as through some form of preventive relief"). Indeed, the Court's controlling decision in *Kalo Brick* involved a state court action for damages, *not* a request for injunctive relief. Thus, NCRR's claim that it seeks only declaratory relief and, possibly, economic damages, does not remove the inherent conflict between its claims and the ICC's authority.

2. NCRR also argues that its suit involves only "well-established precedent" holding that abandonment does not extinguish a railroad's prior contractual obligations and property rights. Opp. 13. This case, however, does not involve routine contractual obligations or property rights *voluntarily* undertaken by the parties. To the contrary, NCRR's routine contract claims have been *rejected* both by the ICC and by the North Carolina courts. In the abandonment proceedings before the ICC, NCRR expressly raised—and the ICC considered and rejected—the claim that Norfolk Southern's proposed line abandonment would breach alleged contractual commitments to preserve the rail corridor and to maintain a "continuous through track connection" between NCRR and Norfolk Southern. Pet. App. 23a-24a.

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[2] In addition, under North Carolina law, the *only* permissible remedy for NCRR's "equitable servitude" claim (Pet. App. 29a) is an equitable injunction; damages are unavailable unless the claimant establishes the stricter requirements for a real covenant "at law." *See Runyon* v. *Paley*, 416 S.E.2d 177, 188-89 (N.C. 1992). Thus, NCRR's assertion in this Court that it does not seek reconnection of these rail lines is utterly inconsistent with its own complaint.

The North Carolina trial court similarly found NCRR's *express* contract and property claims to be without merit, and granted summary judgment for Norfolk Southern on these four counts (*id.* at 12a-13a), an action which the state appeals court declined to review (*id.* at 11a). Thus, the only claims before this Court involving Norfolk Southern, and the only claims as to which the state courts improperly rejected Norfolk Southern's claim of preemption, are those based on various *implied* contract and property claims. *All* of these claims are based on Norfolk Southern's prior operation of a rail line on the property at issue. Thus, the prior operation and abandonment —as regulated and authorized by the ICC—are the central factual elements of NCRR's state law claims. NCRR's claims involve "mere artful pleading" that is insufficient to avoid federal preemption. *Kalo Brick*, 450 U.S. at 324.

Nor can NCRR's surviving "implied" claims be characterized as being based on a "contractual commitment voluntarily undertaken." *Cf. American Airlines, Inc.* v. *Wolens*, 115 S. Ct. 817, 824 (1995) (quoting *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608, 2612 (1992) (plurality opinion)). These implied claims—if they have any substance at all—are properly regarded as state-created duties imposed for the purpose of advancing various public policies (such as state land use policies). Thus, NCRR's assertion that this case is governed by "well-established precedent" governing rail carriers' prior contractual obligations is unfounded.

3. Even if NCRR's implied claims were viewed as "routine" contract claims, the weight of authority indicates that the ICC's authorization of Norfolk Southern's abandonment would preempt NCRR's claims based on inconsistent contractual obligations,[3] although there is

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[3] *See, e.g., Colorado* v. *United States*, 271 U.S. 153, 165 (1926) ("even explicit charter provisions must yield to the paramount power of Congress to regulate interstate commerce"); *Village of Mantorville* v. *Chicago Great W.R.R.*, 8 F. Supp. 791 (D. Minn. 1934) (preempting contract action that would "require the de-

some authority to the contrary.[4] This Court in *Central New England Railway* v. *Boston & Albany Railroad*, 279 U.S. 415 (1929), expressly left open the issue.[5] In this case, the Court could resolve this conflict with a definitive ruling that an abandonment order by the ICC preempts contract claims that are inconsistent with, or that effectively would preclude, the ICC-authorized abandonment.[6]

B. Reply to United States

1. The government's position opposing the grant of *certiorari* in this case is based primarily on a single fundamental error: While acknowledging that the ICC's exercise of abandonment authority preempts inconsistent state-law actions (including actions founded upon written

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fendant to refrain from doing that which the [ICC] stated it might do"); *Western Pac. R.R.* v. *Nevada-Cal.-Or. Ry.*, 40 F.2d 731 (N.D. Cal. 1930) (abandonment authorization relieved railroad of contractual liability to connecting railroad); *Burke County* v. *United States*, 206 F. Supp. 586 (S.D. Ga. 1962); *Moeller* v. *ICC*, 201 F. Supp. 583 (S.D. Iowa 1962).

[4] *Gulf, Mobile & Ohio R.R.* v. *Illinois Cent. R.R.*, 225 F.2d 816, 821-22 (5th Cir. 1955) (ICA does not preempt a railroad's contractual liability for trackage lease payments, where the ICC abandonment order does not expressly address the issue), *cert. denied*, 350 U.S. 932 (1956).

[5] In *Central New England*, the ICC authorized abandonment of a portion of a rail line, and the carrier sought to rely on this authority as a defense to payment of rent for an *adjacent* portion of the line (for which no abandonment authority had been granted). The Court held that because the ICC had not addressed the issue of rental payments on the adjacent line, its decision could not be read to preempt the contractual obligation. The Court pretermitted whether "a proper order of the Commission" (such as the ICC's order in this case specifically rejecting NCRR's contract theory) could extinguish prior contractual obligations. *Central New England Ry.* v. *Boston & Albany R.R.*, 279 U.S. 415, 419-20 (1929).

[6] The government supports this view of the law. *See* Brief for the United States as *Amicus Curiae* at 10 ("U.S. Br.") (a state-law contract suit seeking damages or specific performance *is* preempted if it "has the purpose or practical effect of compelling the resumption of rail service" on a line approved for abandonment).

contractual undertakings), and that the state court below erred in reaching a contrary conclusion (U.S. Br. 7, 10), the government denies that there is any conflict in this case between the ICC's order authorizing Norfolk Southern to abandon the line and NCRR's civil suit. This is clearly wrong. In the government's view, NCRR's action does not intrude on the ICC's abandonment order because NCRR is not seeking to restore "railroad service" (which the government says the ICC authorized Norfolk Southern to cease), but only the preservation of the abandoned line as a railroad right-of-way or corridor for possible future rail use. U.S. Br. 10-11. The government's argument thus construes the ICC's abandonment order as having authorized the cessation of railroad service over the involved rail line, but not the termination of the railroad right-of-way and conversion of the corridor to non-rail uses.

The government's argument, however, inexplicably confuses what this Court several terms ago characterized as "the *important distinction*" between the complete "abandonment" of a rail line, and the more limited "discontinuance" of service on the line. *Preseault* v. *ICC*, 494 U.S. 1, 5-6 n.3 (1990) (emphasis added). In confusing these concepts, the government understates the scope and resulting preemptive effect of the ICC's abandonment order in this case.

The express language of the ICA provides that a rail carrier may not "discontinue" rail transportation operations on a rail line (49 U.S.C. § 10901(a)(2)), *nor* may it "abandon" the line itself, without ICC approval (49 U.S.C. § 10901(a)(1)). The statute makes clear that "discontinuance" and "abandonment" are separate concepts. A railroad authorized to "discontinue" operations may suspend service to shippers on the line until further notice, but may be required to resume service if and when the ICC determines that the public convenience and necessity require it. Therefore, a railroad authorized to "discontinue" operations on a line may *not* take actions—such as transferring or relinquishing its right-of-

way or converting the underlying property to non-rail uses—that would preclude eventual resumption of service on the line. By contrast, the grant of full abandonment authority under § 10903 completely and permanently extinguishes a railroad's common carrier obligation to maintain and provide service on the line. Only after final abandonment authority is granted may a railroad remove its rail assets (such as railroad track and ties) and transfer or sell the underlying right-of-way.[7]

In this case, the government's brief overlooks this critical distinction by effectively treating the ICC's abandonment order as having authorized only the discontinuance of Norfolk Southern's *service* obligations. The government notes correctly that one of the state law claims deemed to be preempted in *Kalo Brick* was based on a state statutory duty to provide rail *service* to shippers on request. U.S. Br. 8; 450 U.S. at 323. Focusing on this fact, the government attempts to distinguish the instant case by noting that NCRR has not expressly alleged that Norfolk Southern has breached a duty to provide rail *service*, as such. Instead, according to the government, NCRR's claims focus only on Norfolk Southern's failure to preserve its railroad right-of-way and maintain its railroad track connection with NCRR's rail line. The government argues that this alleged "non-rail-service obligation" is fundamentally different from the duty alleged in *Kalo Brick*, because it is "voluntarily assumed" and "grounded in state contract and property law." U.S. Br. 10.

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[7] The fundamental distinction between abandonment authorization and discontinuance-of-service authorization has been recognized by the ICC and courts in many cases. *See, e.g., Preseault* v. *ICC*, 494 U.S. 1 (1990); *Glosemeyer* v. *Missouri-Kan.-Tex. R.R.*, 879 F.2d 316 (8th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990); *Norfolk & W. Ry.—Abandonment Between St. Mary's & Minister*, 9 I.C.C.2d 1015 (1993); *PSI Energy, Inc.—Feeder Line Dev.—Norfolk S. Corp. Line Between Cynthiana & Carol, IN*, 7 I.C.C.2d 227 (1991); *Iowa Power, Inc.—Constr. Exemption—Council Bluffs, IA*, 8 I.C.C.2d 858 (1990); *Rail Abandonments—Use of Rights-of-Way as Trails*, 5 I.C.C.2d 370 (1989).

In fact, the obligation of an interstate rail carrier to maintain its right-of-way and track connections is neither voluntary, nor is it grounded in state law. Until the ICC authorized the complete and final *abandonment* of the tracks at issue (as distinguished from authorization to discontinue service over the tracks), Norfolk Southern was obligated by *federal* law to maintain its right-of-way for possible resumption of rail service. NCRR contested the ICC's grant of abandonment authority; NCRR was free to argue that the ICC should have granted discontinuance authority instead—thereby preserving the right-of-way and tracks, and achieving precisely the same remedy NCRR now seeks in state court. By granting Norfolk Southern's request for *full* abandonment authority, however, the ICC determined that continued maintenance of these tracks would *not* further the national rail transportation policy, and was *not* necessary to permit future rail service by NCRR or any other operator. NCRR's attempt to force a contrary conclusion through state court litigation clearly invades the plenary and exclusive authority of the ICC to review and approve rail abandonments—including its authority to require the continued maintenance of right-of-way and track connections, or in its discretion, to permit their abandonment.[8]

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[8] The scope of the ICC's authority over the maintenance or abandonment of right-of-way and track connections is confirmed by the ICC's judicially-approved abandonment regulations, which expressly contemplate the ICC's consideration of the "opportunity costs" of rail assets that could be deployed more profitably in alternative *non*-rail uses. 49 C.F.R. § 1152.33(p); *see Abandonment of R.R. Lines—Use of Opportunity Costs*, 360 I.C.C. 571 (1979), *aff'd sub nom. Farmland Indus., Inc.* v. *United States*, 642 F.2d 208 (7th Cir. 1981); *Cartersville Elevator, Inc.* v. *ICC*, 735 F.2d 1059 (8th Cir. 1984). The ICC properly considers these costs in determining whether continued operation and dedication of a line to railroad uses unduly burdens interstate commerce. A state court action precluding Norfolk Southern from profitably deploying its assets, or subjecting it to money damages for doing so, would similarly burden interstate commerce.

In short, contrary to the impression conveyed by the government, the ICC's abandonment order in this case expressly authorized Norfolk Southern not only to cease active rail service over the line at issue, but also to terminate the right-of-way and convert the underlying property to productive *non*-rail use. NCRR's action, if allowed to proceed, would plainly impose liability on Norfolk Southern, and thus penalize it, for doing exactly what the ICC has authorized it to do. The conflict with the ICC's abandonment authorization is direct and substantial.

2. The government's conclusions are not supported by *Hayfield Northern Railroad* v. *Chicago & North Western Transportation Co.*, 467 U.S. 622 (1984). In that case, after an ICC-approved abandonment had been completed, a newly-formed railroad company condemned and acquired the abandoned railroad property, using eminent domain powers generally applicable to any privately-owned property. *Id.* at 632. In this case, however, NCRR's claims are ultimately based on Norfolk Southern's *prior* use and subsequent abandonment of the property at issue as a railroad right of way. *Hayfield* does not support such claims. See *id.*, at 633 n.11 (Court's ruling "does not mean that in the postabandonment period, States are free to undo the very purposes for which the Commission authorized an abandonment").

3. The ICC's plenary authority in regulating rail abandonments sharply distinguishes this case from *American Airlines, Inc.* v. *Wolens*, 115 S. Ct. 817 (1995). In that case, the Court held that Congress did not intend to preempt all state law contract claims when it enacted an express preemption clause providing that "no State . . . shall enact or enforce any law . . . relating to rates, routes, or services of any air carrier." See *id.* at 825. In this regard, the preemptive effect of an ICC abandonment order is more closely analogous to the express statutory preemption under 49 U.S.C. § 11341(a), which provides that participants in ICC-approved mergers and consolidations are "exempt from the antitrust laws and

from all other law, including State and municipal law" as necessary to complete the transaction. The Court has held that this provision *does* override state contract law, permitting carriers to avoid obligations under collective bargaining agreements that would impede the ICC-approved transaction. *Norfolk & W. Ry.* v. *American Train Dispatchers Ass'n*, 499 U.S. 117, 129 (1991).[9]

4. The concerns at issue in this case arise frequently in cases involving rail abandonments in communities throughout the United States. Individual states and local interests naturally seek to preserve local rail service. Absent clear reaffimation of *Kalo Brick*, local interests will assert a wide range of implied state law property and contract claims designed to frustrate rail line abandonments approved by the ICC. In order to protect and preserve the ICC's exclusive authority in this area, the Court should grant certiorari and reverse the decision of the Court of Appeals of North Carolina asserting jurisdiction in this case.

Respectfully submitted,

L. P. MCLENDON, JR.
MACK SPERLING *
JAMES SAINTSING
BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, L.L.P.
Suite 2000 Renaissance Plaza
230 North Elm Street
P.O. Box 26000
Greensboro, NC 27420
(901) 373-8850

CARTER G. PHILLIPS
VINCENT F. PRADA
DONALD H. SMITH
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Attorneys for Petitioner

May 31, 1995

* *Counsel of Record*

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[9] The pendency of legislative proposals amending the ICA (U.S. Br. 8 n.6) does not undermine the importance of this case or the need for review by this Court. It is impossible to predict at this time whether Congress will enact such legislation or what form that legislation might take.